Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

AMERICAN EAGLE AIRLINES, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Has the Fifth Circuit, in this case as well as other recent cases, departed so egregiously from the principle of limited judicial review of labor arbitration awards, as established by decisions of this Court, that review and reversal are required to protect that principle from being further eroded?

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PETITION FOR A WRIT OF CERTIORARI

The Air Line Pilots Association, International ("ALPA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 343 F.3d 401, and is reprinted in the appendix to the petition, App., *infra*, 1a-24a. The Memorandum Opinion and Order of the U.S. District Court for the Northern District of Texas, Fort Worth Division, is not reported, but is reprinted at App., *infra*, 26a-36a. The labor arbitration Opinion And Award that was vacated by the District Court is reprinted at App., *infra*, 37a-58a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 2003. App., *infra*, 1a. ALPA filed a timely Petition for Rehearing En Banc on August 27, 2003. The Court of Appeals denied ALPA's petition on September 11, 2003. App., *infra*, 59a-60a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The issue in this case is not one of statutory construction, but rather whether the decision of the Court of Appeals that a labor arbitration award should be vacated conflicts with decisions of this Court as well as other courts of appeals concerning the limited scope of judicial review of arbitration decisions. Because the arbitration award was issued by a System Board of Adjustment, an arbitral panel established pursuant to the requirements of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, we set forth the relevant provisions of that statute, specifically 45 U.S.C. § 153 First (i), 45 U.S.C. § 153 First (q), 45 U.S.C. § 153 Second, and 45 U.S.C. § 184. App., *infra*, 61a-63a .

STATEMENT OF THE CASE

A. Proceedings Below

This case arose when American Eagle Airlines, Inc. ("American Eagle" or "the Company") brought suit in the U.S. District Court for the Northern District of Texas to vacate an arbitration award issued by the System Board of Adjustment under a collective bargaining agreement ("CBA") between the Company and ALPA. The District Court had jurisdiction to hear the matter pursuant to 28 U.S.C. §§ 1331 and 1337 because the action arose under the Railway Labor Act. App., *infra*, 27a. In a Memorandum Opinion and Order, the District Court granted the Company's motion for sum-

mary judgment, denied ALPA's corresponding cross-motion, and vacated the Board's award. App., *infra*, 26a-36a. The Court of Appeals affirmed. App., *infra,* 1a-16a.

B. The Decision Of The System Board

The issue presented to the System Board ("Board") was whether the discharge of an American Eagle pilot, Captain Terry Balser, was for just cause, and, if not, what is the remedy? App., *infra*, 37a. The Board found that the statements and actions of Captain Balser towards a minority employee had violated the Company's anti-harassment policy. The Board also found that Captain Balser carried a plastic knife-like martial-arts weapon known as a "dirk" into the workplace in his flight bag, and that he violated Company rules as well as California law by doing so. App., *infra,* 50a, 51a-54a.

But the Board also found that the Company had failed to provide Captain Balser with a "first step" hearing to which he was entitled under the grievance procedure of the CBA, which provides that "[a] first step hearing *will* be held at the pilot's domicile" within 14 days after it is requested (emphasis added). App., *infra*, 46a-50a. The CBA further provides that "[i]f the Company fails to . . . hold a *required* hearing within the time limits specified, the pilot and the Association may consider the grievance denied" (emphasis added). App., *infra*, 48a. The Company argued that Captain Balser waived his right to a first-step hearing by considering the grievance denied and moving on to arbitration, but the Board disagreed. It reasoned that because the relevant CBA provision used the words "required hearing," the negotiators of that provision intended that a hearing be held if the grievant wanted one. The Board further reasoned that "an early opportunity [for discharged employees] to be heard . . . has often been considered fundamental in the world of collectively-bargained agreements." App., *infra*, 48a-49a.

With respect to remedy, the Board said it was obliged to "address the violations on both sides of the case . . . in such a way as to reduce the probability that they will occur again in the future" and that it had "fashioned a remedy which, we believe, achieves that result[:]"

> To remedy the fact that Captain Balser was denied the opportunity for a timely first step hearing, we find that reinstatement with some back pay is appropriate. To remedy the serious violations by Captain Balser, we find that a substantial period of time without pay (in effect, a disciplinary suspension without pay) is appropriate.

App., *infra,* 56a-57a.

C. The Decision Of The Court Of Appeals

On August 14, 2003, in an opinion written by Judge Benavides and concurred in by Judge Wiener, the Court of Appeals affirmed the District Court's grant of summary judgment vacating the award. Judge Dennis dissented.

First, the Court held, directly contrary to the Board's interpretation of the CBA, that "[b]y invoking arbitration, ALPA implicitly considered the grievance denied and waived any other alternative it may have had concerning American Eagle's failure timely to conduct a first-step hearing." App., *infra,* 8a-9a.

Second, the Court held, again contrary to the Board, that "even if the failure to hold the first-step hearing were a procedural default, it would be improper to consider this failure in the just cause analysis . . ." because the asserted procedural default occurred after the grievant was terminated. App., *infra,* 11a-13a.

Finally, the Court held that, absent consideration of the first-step hearing procedural default, "there was an implicit finding of just cause because the Board's opinion concludes

that Balser's conduct clearly justified his firing." App., *infra*, 13a-15a. The majority decision explained in a footnote:

> In this case, the reasoning by implication is as follows: (1) to constitute grounds for termination under the CBA, the act or acts in question must constitute just cause, *i.e.*, an employee can be terminated for any act or acts that constitute just cause; (2) the Board found that Balser seriously violated his obligations and that American Eagle had a duty to rid the workplace of Balser's conduct; (3) thus, the Board must have found that American Eagle had just cause to terminate Balser.

App., *infra*, 14a, n.5.

D. The Dissenting Opinion

Dissenting Judge Dennis took issue with the majority on all three issues. First, Judge Dennis rejected the panel majority's determination that ALPA waived the grievant's right to a first-step hearing by proceeding to arbitration. He pointed out that the CBA "expresses the first-step hearing requirement in mandatory terms" and that the Board had explained that the contract "addressed the union's procedural quandary of where to go when the employer failed to provide the required hearing, and did not address what the remedy would be for the airline's failure to provide the required hearing." App., *infra*, 18a. Hence, Judge Dennis said, there is "no question" that the Board was arguably construing or applying the contract, and therefore the majority should not have disturbed the Board's interpretation on review even if it believed the Board misread the contract. *Id.*, citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

Second, Judge Dennis faulted the majority for upsetting "an 'arguable' contract interpretation" by the Board that it could consider the Company's post-termination procedural violation in deciding whether there was "just cause" for Captain Balser's discharge. App., *infra*, 20a. Judge Dennis

cited *Chauffeurs, Teamsters and Helpers Local Union 878 v. Coca Cola Bottling Co.*, 613 F.2d 716 (8th Cir. 1980), and other cases[1] in which courts "have allowed arbitrators to include procedural requirements as components of just cause . . ." App., *infra*, 19a - 20a. Again citing *Misco* at 39-40, Judge Dennis said that any limitation on the arbitrator's authority in this regard must be found in the CBA, and there was none here. App., *infra*, 20a - 21a.

Lastly, Judge Dennis found no support for the majority's holding that, aside from the procedural violation, the Board implicitly found "just cause" for Captain Balser's discharge. App., *infra*, 22a-24a. He pointed out that "here there is no contractual list of offenses that constitute just cause, the finding of which terminated the arbitrator's discretion" (App., *infra*, 23a); "the arbitrator here never stated that the offenses that he found Balser guilty of were offenses that themselves constituted just cause" (*id.*); and the Board's statement that the airline had the right to rid the workplace of Balser's misconduct does not constitute a finding of just cause because "[m]any steps short of termination would severely punish Balser for engaging in unacceptable conduct and deter the conduct from recurring, thereby 'ridding' the workplace of that behavior." *Id.*

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because this case is the latest in a line of Fifth Circuit decisions that have patently misapplied the principles set forth by this Court that limit judicial review of labor arbitration awards. In each of these cases, including the present one, the Fifth Circuit acknowledged

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[1] *Anaconda Co. v. District Lodge No. 27 of the Int'l Ass'n of Machinists and Aerospace Workers*, 693 F.2d 35, 37 (6th Cir. 1982); *Safeway Stores v. United Food and Commercial Workers Union*, 621 F. Supp. 1233 (D. D.C. 1985).

these principles, yet then reached a result that is totally inconsistent with them.

This Court made clear more than 40 years ago in the *Steelworkers Trilogy*[2]—and has consistently reiterated—that courts are not authorized to review the merits of an arbitrator's decision even if it allegedly misinterprets the parties' agreement. *Misco*, 484 U.S. at 36. "[I]f an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509-10 (2001), quoting *Eastern Associated Coal Corp. v. UMW, District 17*, 531 U.S. 57, 62 (2000), and *Misco*, *supra*, at 38. In *Garvey*, this Court summarily reversed the Ninth Circuit, which had set aside an arbitration award, stating that "the Court of Appeals here recited these principles, but its application of them is nothing short of baffling." 532 U.S. at 510.

Similarly here, the Fifth Circuit's opinion recites the applicable principles, but its application of them is at least as baffling as in the Ninth Circuit's *Garvey* decision.

First, the question of whether ALPA waived the first-step grievance hearing by proceeding to arbitration is one of pure contract interpretation. The Board found there was no waiver, citing CBA language that referred to a first-step hearing as "required" and stating it "will" be held. The Board drew as well on its own experience that "an early opportunity to be heard" is "fundamental in the world of collectively-bargained agreements." *Supra*, p. 3. The Board's interpre-

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[2] *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

tation may not be the only plausible interpretation of the CBA, but plainly the Board was interpreting the CBA, and the Court of Appeals was not free to substitute its interpretation for that of the Board.

Second, the Court of Appeals clearly erred in holding that the Board could not consider the denial of a first-step hearing in determining whether there was "just cause" for Captain Balser's discharge. Because the CBA contains no definition of "just cause," it is the Board that must determine the meaning of that term. Here, as dissenting Judge Dennis aptly put it, the Board's conclusion "that the contract intended just cause to include the requirement that the employer hew to the prescribed grievance procedures . . . was an 'arguable' contract interpretation not in conflict with the contract's plain language, and therefore not subject to judicial reversal. *Eastern Associated Coal*, 531 U.S. at 62." App., *infra*, 21a. *Accord, Misco*, 484 U.S. at 40 ("'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator").

Moreover, as the majority decision below acknowledged, the decisions of courts in other circuits have "held that an arbitrator could consider a Company's failure to abide by a bargaining agreement's procedural requirements in determining whether cause existed for dismissal." App., *infra*, 11a (citing *Chauffeurs*, *supra*; *Anaconda Co. v. District Lodge No. 27*, 693 F.2d 35, 37 (6th Cir. 1982); *Safeway Stores, Inc. v. United Food and Commercial Workers Union, Local 400*, 621 F.Supp. 1233, 1237-38 (D.D.C. 1985)).[3] The panel

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[3] *Accord, Tennessee Valley Authority v. Tennessee Valley Trades and Labor Council*, 184 F.3d 510, 516 (6th Cir. 1999); *Federated Dept. Stores v. United Food & Commercial Workers, Union Local 1442*, 901 F.2d 1494, 1497 (9th Cir. 1990); *Johnston Boiler Co. v. Local Lodge No. 893, Int'l Bhd. Of Boilermakers*, 753 F.2d 40, 43 (6th Cir. 1985).

decision attempts to distinguish these cases because they "concern only a Company's pre-termination procedural failings" rather than the post-termination procedural violation we have here. App., *infra*,11a-12a. However, from the standpoint of denial of procedural due process, there is no meaningful difference between an employee's right to tell his side of the story prior to termination and the employee's contractually guaranteed right to persuade his employer at a first-step hearing to reverse the initial decision to terminate him. The CBA here does not limit the Board to considering only pre-termination procedural violations. Hence, the distinction relied on by the panel majority is an entirely artificial one that fails to eliminate the conflict on the issue between the Fifth Circuit and other circuits.

Third, the Court of Appeals was wrong in holding that because the "[System] Board found that Balser seriously violated his obligations and that American Eagle had a duty to rid the workplace of Balser's conduct . . . the Board must have found that American Eagle had just cause to terminate Balser." App., *infra*, 14a, n.5. The conclusion does not logically follow from the premise. The CBA neither defines "just cause" nor contains any provision that would support the proposition that if the Board finds misconduct that cannot be tolerated in the workplace, the Company has the automatic right to discharge the perpetrator. Judge Dennis was plainly correct in pointing out that "the arbitrator's statement that the airline had the right to rid the workplace of harassment is not the same as finding just cause to terminate Balser . . . [because] [m]any steps short of termination would severely punish Balser for engaging in unacceptable conduct and deter the conduct from recurring, thereby 'ridding' the workplace of that behavior." App., *infra*, 23a. The Board itself, in discussing remedy, stated that it had chosen a punishment for Balser—a disciplinary suspension without pay—that was likely to deter any repetition of his prior misconduct. *Supra*, p. 4. In short, by inferring a finding by the Board of "just

cause" when there was no logical basis for doing so, the Court of Appeals usurped the authority that this Court has made clear belongs to the Board.

This is not the only case in which the Fifth Circuit has usurped the authority of the arbitrator. There is a pattern of such decisions by that Court.

In *Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers, Local Union No. 2713*, 103 F.3d 449 (5th Cir. 1997), the Court vacated an arbitration award that reduced the discharge of the grievant to a ten-day suspension. The arbitrator found that the grievant falsely told her employer that she needed time off to assist her daughter in getting to a doctor's appointment when, in fact, she actually needed the time off to pay an overdue electric bill (which, if not paid by Friday noon, would have left her without electricity for the entire weekend). *Id.* at 450, 453. The CBA provided that an employee could be immediately discharged for "[s]tealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury." *Id.* at 451, n.1. The Court held that "[b]y definition, lying is immoral conduct . . ." and, hence, "the arbitrator exceeded the express limitations of his contractual mandate" by not upholding the discharge. *Id.* at 452, n.4. However, as the dissenting judge quite properly pointed out, "the majority *interprets* the term 'immoral conduct' and comes to a conclusion different from that reached by the arbitrator. That is not the court's proper role." *Id.* at 454 (ital. as in original).

In *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599 (5th Cir. 1989), the arbitrator found that a steamboat captain was "grossly careless" in maneuvering his vessel, but that discharge was too severe a penalty in light of the captain's forty years of untarnished service and the Company's treatment of other pilots involved in serious mishaps. *Id.* at 601. The Court vacated the award, holding that the arbitrator was required to deny the grievance

because a provision in the CBA stated that "proper cause" for discharge includes "carelessness." *Id.* at 601, 604. A petition for rehearing and suggestion for rehearing en banc were denied. *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 897 F.2d 746 (5th Cir. 1990). Four judges dissented, asserting that the "panel opinion constitutes a significant and regrettable departure from . . . well established law" that is based on nothing more than "an intense disagreement with the arbitrator's reinstatement decision . . ." *Id.* at 746. The dissent emphasized that, in the absence of a specific limitation on the arbitrator's authority, the court "had no right to interpret the contract to forbid the arbitrator the power to mitigate the discipline because, at best, the contract is ambiguous" and "*Misco* made clear that the inquiry . . . is whether the arbitrator's interpretation is a reasonable one, not whether it is the 'right' one." *Id.* at 749. Hence, the dissent said, the Court's decision sends "a signal to companies that lose labor arbitrations which says: 'Come to us! If we think the interpretation of your contract is wrong even though the provision is ambiguous, we will find for you that the arbitrator exceeded his jurisdiction and set the award aside.'" *Id.* at 750.

In *Houston Lighting & Power Co. v. Int'l Bhd. of Elec. Workers, Local No. 66*, 71 F.3d 179 (5th Cir. 1995), the CBA allowed the Company to lay off employees in accordance with their relative ability, skill, and qualifications, and provided that seniority would govern where these were equal. The arbitrator determined that the grievant was improperly laid off because, although the Company used contractually allowable factors, its application of those factors in his evaluation was unreasonable. *Id.* at 181. Based on the arbitrator's re-evaluation, the Company was ordered to reinstate the grievant with backpay, seniority, and benefits. *Id.* The Court of Appeals vacated the arbitration award. The Court held that, although the Company's contractual right to determine an employee's ability, skill, and qualifications was

explicitly made subject to an employee's right to assert a grievance, the "definition of 'a grievance' can[not] be rationally interpreted to include the concept that a grievance includes a claim that an employee has been unfairly or incorrectly evaluated for lay off." *Id.* at 184. In so holding, the Court was obviously interpreting the CBA rather than deferring to the arbitrator's interpretation. Judge Lay of the Eighth Circuit, sitting by designation, dissented because the "plain terms" of the CBA subject the Company's determination of the grievant's ability, skill, and qualifications to the grievance process; the grievance provision "simply cannot be ignored[;]" and the arbitrator was acting well within his authority to find that the Company acted unreasonably and unjustly in the manner that it applied its layoff evaluation process to the grievant. *Id.* at 186.

In *E.I. DuPont de Nemours & Co. v. Local 900, Chemical Workers Union*, 968 F.2d 456 (5th Cir. 1992), the submission to the arbitrator was a standard one in discharge cases: "Were the Grievants discharged for just cause under the contract? If not, what is the appropriate remedy?" *Id.* at 459. The arbitrator found that the grievants had used marijuana on Company premises, and that "'the Company made it plain to its employees that using drugs on the Company premises was a discharge offense.'" *Id.* at 458. However, the arbitrator concluded that "while discharge was an available punishment, in this case it was inappropriate, and therefore ordered reinstatement, rehabilitative treatment, and follow-up drug testing." *Id.* The Court of Appeals disagreed, holding "that the arbitrator's language with regard to Grievants' use of marijuana on company premises constituted a[n] [implicit] finding of just cause[,]" and that "'an appropriate remedy' is only at issue if Grievants were discharged without just cause." *Id.* at 459.

Significantly, the *DuPont* opinion never cited *Misco*, which had been decided by this Court, reversing the Fifth Circuit,

only five years previously, and which resolved the same issue raised in *DuPont* quite differently. In *Misco*, the grievant allegedly brought marijuana on to the Company's premises, thereby violating a Company rule that listed doing so as a cause for discharge. 484 U.S. at 32-33. One of the issues this Court addressed in *Misco* is whether, assuming the grievant did violate the Company's rule against bringing narcotics on to Company premises, the Court of Appeals "could properly set aside the award because in its view discharge was the correct remedy." 484 U.S. at 41. This Court left no doubt that the Court of Appeals could not do so, because "[n]ormally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct." *Id.* Quoting from *Enterprise Wheel*, 363 U.S. at 597, and adding emphasis, this Court reiterated that the arbitrator "'is to bring his informed judgment to bear in a fair solution to the problem. *This is especially true when it comes to formulating remedies.*'" The Court recognized that the parties could limit the arbitrator's remedial authority, but said that whether they in fact did so was a matter of contract interpretation for the arbitrator. 484 U.S. at 41-42. In *DuPont*, the Fifth Circuit did not leave the issue of the arbitrator's remedial authority for the arbitrator to decide as a matter of contract interpretation. Contrary to *Misco*, it decided that issue itself.

Lastly, in *Container Products v. United Steelworkers*, 873 F.2d 818, 819 (5th Cir. 1989), the Court of Appeals held that the arbitrator acted "ultra vires" in reducing a discharge to a lesser penalty. The CBA provided that an arbitrator who finds "proper cause" for a dismissal is not authorized to modify that penalty. *Id.* at 818-19. The Court of Appeals conceded that the arbitrator "made no clear finding as to the existence or non-existence of just cause." *Id.* at 819. Nevertheless, the Court concluded that "the arbitrator implicitly found the existence of just cause for dismissal." *Id.* However, the teaching of *Misco* is that, rather than search for what the arbitrator may or may not have intended by implication, "the

proper course would have been to remand to the arbitrator for a definitive construction of the contract . . . " (484 U.S. at 42)—*i.e.*, a definitive construction of "proper cause" as applied to the grievant's dismissal.

In sum, the Fifth Circuit has not accorded the deference to labor arbitration awards mandated by this Court's decisions. In the case at bar, the Court of Appeals disregarded the System Board's contract interpretation with respect to procedural due process, and used its own reading of "just cause" as the basis for vacating the Board's award. It did the same to the arbitral awards in *Bruce Hardwood*, *Delta Queen*, *Dupont*, and *Container Products*. In those cases, as in our case, the Court of Appeals erroneously equated the arbitrators' findings that the grievants engaged in the misconduct for which discipline was imposed with implicit findings that the dismissals were justified. None of the arbitrators made any such findings explicitly, and *Misco* instructs that uncertainty about what an arbitrator did find should be resolved by a remand back to the arbitrator for a clarification.

The totality of these cases requires this Court's intervention to correct the Fifth Circuit's misunderstanding as to how the well settled principle of judicial deference to labor arbitration awards must be applied. This case, in which the departure from the appropriate standard is even more egregious than *Garvey*, presents a compelling vehicle for the Court to do so.[4]

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[4] This Court has had occasion in the past to especially emphasize the importance of limiting judicial review of arbitration awards in cases, like the present one, that arise under the Railway Labor Act: "In enacting this legislation, Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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of collective-bargaining agreements." *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 94 (1978), *reh'g denied*, 439 U.S. 1135 (1979). Congress endeavored to promote the same stability in labor-management relations in the airline industry when it amended the Railway Labor Act in 1936 to encompass that industry and to specifically require carriers and airline unions to establish adjustment board arbitral panels. 45 U.S.C. § 184. Decisions like the present one are an incentive for carriers dissatisfied with system board of adjustment awards to ask the federal courts to set those awards aside, particularly those carriers—for instance, American, Continental, and Southwest—that have their headquarters within the jurisdiction of the Fifth Circuit.